

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.**

Date: September 11, 1997

Case No: 95 INA 153

In the Matter of:

ROBERTA CLAPPER,
Employer,

On Behalf of:

HELENA CZAJKOWSKA,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of HELENA CZAJKOWSKA (Alien) by ROBERTA CLAPPER (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On October 18, 1993, the Employer applied for labor certification to permit her to employ the Alien on a permanent basis as a "Cook Kosher" to perform the following duties in her household:

Prepares, seasons, and cooks soups, meats, vegetables, etc. Entrees have to be prepared in accordance with the principles of Kosher cuisine. Bakes, roasts, broils meat, fish and other food. Prepares Kosher entries, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorates dishes according to the nature of celebration. Purchases foodstuff and accounts for the expenses incurred.

The work week was forty hours from 8:00 AM to 5:00 PM with no overtime at the rate of \$12.48 per hour. The position was classified as "Cook (Household)(Live-Out)", under DOT Code No. 305.281-010.² The application (ETA 750A) indicated as education requirements the completion of elementary and high school, and further required that applicants have two years of experience in the Job Offered. AF 12.³

In an addendum to the application dated January 4, 1994, the Employer described her need for a household cook and then stated that, "Because of religious considerations food served in has to

²DOT No. 305.281-010 Cook (Domestic ser.)Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

³The Alien's application represented that she worked from January 1990 to October 1993, as a "Cook Kosher" at a residence in New York, N.Y., and completed high school in Poland.

be prepared according to the principles of Kosher cuisine."

The cooking would be performed for the members of the Employer's household, which consists of the Employer, who works full time, her husband, and her 83 year old mother, who no longer can cook because of advanced age. AF 09. After the job was advertised, two responses were received. AF 20, 26.

Notice of Findings. On June 30, 1994, a Notice of Findings (NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted.⁴ The CO said the Employer's application failed to establish that the position at issue was permanent fulltime employment within the meaning of the regulations after considering the application and the addendum noted above. The CO required that this finding be rebutted with

evidence that the requirement arises from a business necessity rather than employer preference or convenience and is customary to the employer. To establish business necessity under [20 CFR §] 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and {are} essential to perform the job in a reasonable manner.

AF 44.

The CO then listed the evidence necessary for the Employer to prove that the job offered is a full time position. The CO described the information required by stating several requests for specific facts that included responses to explicit questions, all of which were designed to draw out collateral information addressing this issue. AF 43-44.

In a later section of the NOF, the CO concluded:

We note that this is one of approximately 12 applications filed by Eastern European Council, Ltd., in behalf of employers for fulltime household Cooks. In all applications, the employer responded in an essentially identical manner to a State of New York inquiry concerning who was presently performing the duties of Household Cook: a relative was currently performing the duties and was no longer able because of either personal or health reasons. Please clarify, explaining how the employer handles these duties

⁴The CO cited 20 CFR § 656.50, but there is no such regulation. It is assumed that the CO meant to refer to the definitions for this part at 20 CFR § 656.3, which contain the following: "Employment means permanent fulltime work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."

when the relative, who is not a paid employee, was unavailable, given the employer's demanding work schedules. AF 43.

Rebuttal. On July 20, 1994, the Employer filed a rebuttal in which she described her need for the services of a household cook, describing the frequent working meeting at the house with business associates, her husband's special diet and meal frequency, and other household arrangements elicited by the CO's questions. In addition, she described the time required for meal preparation and service and the other time consuming tasks connected with this process. She noted that her daughter now was doing the cooking for the Employer, her husband, and her aged mother, as well as helping the Employer with house cleaning work, again making reference to their need for Kosher food.

Final Determination. On August 15, 1994, the CO denied certification on grounds that the Employer failed to prove that the position at issue

constituted full-time employment, is customary to the Employer, and arises from a business necessity rather than employer preference or convenience.

The CO then listed the required information stated in the NOF and stated that the Employer's rebuttal did not address these issues satisfactorily.

According to the analysis by the CO, the daily tasks listed in the rebuttal would require more than an eight hour day to perform, even though the application did not make any provision for overtime compensation. Cf supra. The CO then noted that the Employer failed to provide explicit information about the persons who were guests for the business entertainment mentioned in the NOF. Observing that the Employer had failed to provide requested details about her husbands special diet, the CO pointedly said also that

In response to question number four, the employer states that she has never employed a full-time cook prior to this application. It appears, therefore, that the employer has not in the past customarily employed a full-time cook and presents no change in household circumstances to justify the need to employ one now.

AF 49. The CO then denied certification on grounds that the Employer had failed to meet the requirements of 20 CFR 656.

Employer's appeal. In seeking review of the denial of certification the Employer took issue with the CO's conclusion and offering clarification of the rebuttal in response to the comments of the CO in the FD. The Employer disagreed with the

CO's interpretation of the schedule of duties and times that she supplied in the rebuttal, indicating that her rebuttal should have been construed in conjunction with the duties set out in the job description stated in her application. She then argued that proof of business necessity is not required, notwithstanding the CO's application of the Act and regulations to the facts of this case. Finally, the Employer remonstrated with the CO's reference to other unidentified applications handled through the same immigration agent for other persons in the past.

DISCUSSION

Under 20 CFR § 656.3, "Employment" means permanent full time work by an employee for an employer other than oneself. On this basis it is found that the CO's request for specific information regarding the Employer's job opening was reasonable and the CO may require proof that a position for household cooks is confined to cooking on a full time basis. **Dr. Daryao S. Khatri**, 94 INA 016 (Mar. 31, 1995). This reasoning is apt where, as in this case, the Employer has not previously employed a household cook, no other household workers are employed, and the Employer's account does not clearly explain how the household chores other than cooking will be performed.

As the employer bears the burden of proving that a position is permanent and full time, certification may be denied, if the employer's own evidence is not sufficient. It follows that while the CO's findings may not be based on speculation, undocumented statements of an employer which are inconsistent or illogical are not compelling evidence of entitlement to certification. **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988). In this case, the CO did not find that the Employer's rebuttal established the full time nature of this job offer or that it was a customary requirement of this household.

As this position description includes two years of specialized cooking experience in the duties of a Kosher cook, the effect of the job requirement is to eliminate a U. S. applicant with two years of cooking experience, who has no experience in Kosher cooking. On the other hand, the CO confused the finding that the Employer failed to sustain his burden of proof that this position offers full time employment for a forty hour week with the issue of the business necessity of a job requirement that was unduly restrictive.

We cannot conclude that the CO's Final Determination is reasonable or supported by sufficient evidence in the record as a whole. Consequently, this application will be remanded to the CO with the following instructions. The CO is directed to consider whether Employer's requirement of two years in cooking kosher foods is unduly restrictive. This will require the showing of

business necessity under 20 CFR § 656.21(b)(2)(i)(B), which provides that the job requirements shall be those normally required for the position in the United States, as defined in the DOT, unless such requirements are adequately documented as arising from business necessity. If the CO believes that full time employment is not being offered, the CO will also develop additional evidence on that further issue.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby VACATED and this matter is REMANDED for further proceedings in accordance with this decision.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No: 95 INA 153

ROBERTA CLAPPER, Employer,
HELENA CZAJKOWSKA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
	:	:	:	:
	:	:	:	:
Huddleston	:	:	:	:
	:	:	:	:
	:	:	:	:

This has been redrafted and is again submitted for the panel's consideration. Please append your dissent or concurrence to the BALCA Vote Sheet and return to me.

Thank you,

Judge Neusner

Date: July 21, 1997